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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-52

ALFRED R. PIERCE, Petitioner

v.

CAPITAL CITIES COMMUNICATIONS, INC.

and

RICHARD KELLMAN

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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ISSUES PRESENTED

Under the decisional law of Pennsylvania, is any part of the television broadcast of which Petitioner complains, considering each part both

separately and in the context of the entire broadcast, reasonably capable of a defamatory meaning as to Petitioner?

Was summary judgment properly entered for Respondents in a defamation action by a public figure and former public official complaining of a television broadcast about the bi-state public agency of which he was a Commissioner, when (1) no facts are in dispute, and (2) Petitioner's principal contention is that Respondents, who refrained from charging Petitioner with any conflict of interest, were required to include in the broadcast explicit statements to exculpate Petitioner of any conflict of interest?

STATEMENT

Petitioner seeks review of the unanimous decision of the Court of Appeals (Adams, Weis, Circuit Judges and Coolahan, District Judge) affirming the summary judgment entered in the District Court

(Higginbotham, District Judge), in a defamation action complaining of a news broadcast prepared by respondent Richard Kellman for WPVI-TV, a television broadcasting station in Philadelphia owned and operated by respondent Capital Cities Communications, Inc. Petitioner agrees (Petition 3) that he is a former public official and public figure within the meaning of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), Curtis Publishing Co. v. Butts, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring in result), and subsequent decisions, having been Mayor of the City of Camden for ten years ending in 1969 and a Commissioner of the Delaware River Port Authority from 1962 to mid-1970. The news broadcast at issue concerned the Delaware River Port Authority, a bi-state public agency (Court

of Appeals Opinion A. 17 n.2*), with the "principal focus" being the conduct of Ralph Cornell, Chairman of the Port Authority at the time of the broadcast in 1973 (C.A. Opinion A. 17 n.3, quoting Petitioner's deposition). References to Petitioner in the broadcast were in relation to his status as former Mayor and Port Authority Commissioner.

A transcript of the audio portion of the broadcast is reproduced in the Appendix filed in the Court of Appeals at 279a-290a; a videotape of the broadcast, reproducing exactly both the video and the audio material as broadcast on November 30, 1973, is in the

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* The Court of Appeals opinion is cited herein as "C.A. Opinion" with page references to Petitioner's Appendix bound with the Petition; the District Court opinion is cited as "Opinion" with page references also to Petitioner's Appendix; page references with the suffix "a," citing to the pleadings, depositions and other evidence on which the summary judgment was based, are to pages of the Appendix in the Court of Appeals.

record below and was viewed in its entirety by both the District Court and the panel of the Court of Appeals. The entire broadcast, insofar as pertinent to Petitioner's claim, is fairly summarized in the opinion of the Court of Appeals at A. 17-20.

The only feature of this case which distinguishes Petitioner's claims from those which have been the subject of summary judgment in dozens of defamation cases since New York Times, is that Petitioner now places his sole reliance upon alleged "innuendos" which Petitioner believes are to be inferred from various portions of the program. Petitioner contends that these innuendos charge him with "conflict of interest." In his deposition, Petitioner was repeatedly unable to link the innuendos which he had alleged in his Complaint with any statement of fact contained in the broad-

cast (Pierce deposition A. 228-230a), and respondents disclaimed their having made any such charges. During the extensive pre-trial discovery, in which Petitioner examined all the so-called "out-takes" (more than four hours of film not used in the broadcast), and all the internal memoranda generated between the reporter Kellman and his superiors during preparation of the broadcast, it was established that respondents had considered whether to charge Petitioner with a conflict of interest, but finally decided not to do so. C.A. Opinion A. 26, 40.

The pre-trial discovery also revealed a possible explanation of Petitioner's perception that portions of the program had charged him by "innuendo" with unethical conduct. Petitioner had complained (Complaint, par. 23), of a description in the broadcast of a 1969 controversy involving construction

of a bridge over the Delaware River, in which Petitioner was referred to only in the audio narration stating "New Jersey commissioners voting 'no' [against re-bidding a contract] including Chairman Alfred R. Pierce and the present Chairman Ralph Cornell"(Complaint par. 18, A. 7a).

Although this portion of the program neither explicitly nor implicitly alleged any improper motivation on the part of any commissioner in voting in 1969 to go forward with construction of the bridge even though the lowest bid was much higher than anticipated, Petitioner alleged that this portion of the broadcast charged him by innuendo with dereliction of duty and impropriety by his voting against re-bidding "because readvertisement of bids would delay construction of said bridge and thereby postpone plaintiff's realization of profits in anticipated resale of land in

strategic location to the completed bridge," (Complaint, par. 19), and that the same portion of the broadcast also accused him of having "used his public office for his private profit, and thereby abused his public trust. . . by sitting as a member of said Port Authority when the location and construction of said [bridge] was approved, the plaintiff already and previously being the owner of certain land described as being of strategic location to the New Jersey terminus of said bridge and the value of which would be enhanced by said construction" (par. 23).

Respondents contended that they had made no such charge and Petitioner could not point to any portion of the broadcast which made that accusation. But respondents' subsequent investigation, conducted after the litigation commenced, and later confirmed by Petitioner's depo-

sition, showed that the innuendo alleged by Petitioner was in fact literally true, i.e., at the time of the Port Authority re-bidding vote in 1969, Petitioner was in fact the secret owner of an interest in land in "strategic location to the completed bridge" (Pierce Deposition A. 217a), and at the time of the re-bidding vote, Petitioner did not disclose, officially or informally, to any other Port Authority commissioner that he owned an interest in that land (A. 222a). Moreover, the secret property interest was of substantial value to Petitioner. When he acquired his interest, in 1967, it was valued at $20,000, but actually worth less; after the 1969 vote and the construction of the bridge approved by that vote, the land increased in value to the extent that Petitioner sold 60% of his interest for a total of $38,000, retaining 40% which he valued at the time of

his deposition in 1976 at approximately $40,000 (A. 80a, 81a-82a, 86a).

The District Court found it to be "ironic that at the time of this [Port Authority] meeting . . . , plaintiff did own an interest in land which he characterized as strategically located to the completed bridge" and had not disclosed this interest to any other Commissioner (Opinion A. 10), and had thus been guilty, by his own admission, of conduct which Petitioner himself stated would be equivalent to having "used his public office for his private profit, and thereby abused his public trust . . . ." as stated in paragraph 23 of Petitioner's own Complaint, ascribing that innuendo to respondents' report of the re-bidding vote. However, neither the District Court nor the Court of Appeals based any part of their action upon this surprising

proof of Petitioner's insincerety in complaining of an innuendo which, although not contained in the broadcast, was secretly known by Petitioner to be the truth.

All the facts, both concerning the preparation of the broadcast and the exact content of the broadcast, and concerning Petitioner's own conduct as referred to in the broadcast, are not in dispute. Petitioner claims no particularized or "special" damages. One minor factual inaccuracy was found by Petitioner in the references to him in the broadcast, i.e., that Petitioner was not the "brother-in-law" of a Port Authority employee convicted of using Port Authority property and services in constructing an addition to his private home, since Petitioner and the convict were married to cousins, rather than siblings. This appeared immaterial to the court

below, since Petitioner had a close relationship with the convict, including having acted while a Commissioner to "recommend him highly" for his first job with the Port Authority (A. 187a), and the record established that respondent Kellman had been informed by persons associated with Petitioner that the convict was his brother-in-law and that Petitioner "had been so identified in published sources" (C.A. Opinion A. 20, 23-24 n.11). Petitioner seemed to have abandoned this contention in the Court of Appeals (C.A. Opinion A. 23), and does not refer to it in the instant Petition.

The District Court, after viewing the videotape and considering the extensive pre-trial discovery, including depositions and quantities of documents, was critical of the broadcast for having omitted exulpatory

references to Petitioner, but found these ommissions to be among the errors which are protected by the First and Fourteenth Amendments, citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340, New York Times v. Sullivan, 376 U.S. at 272, and Greenbelt Publishing Ass'n v. Bresler, 398 U.S. 6 (1970). The Court of Appeals, in a comprehensive opinion by Circuit Judge Arlin M. Adams, held (1) that the matters complained of by Petitioner were, under the law of Pennsylvania, not subject to a defamatory construction, so that "under Pennsylvania law no defamation has occurred in the present situation" (C.A. Opinion A. 32), and (2) even if actionable under state law, the broadcast "nevertheless would be privileged on constitutional grounds" (C.A. Opinion A. 32).

REASONS FOR DENYING THE WRIT

A. The Court of Appeals' interpretation of the decisional law of Pennsylvania is manifestly correct and no consideration of the Constitutional issues is required in this case.

The panel of the Court of Appeals included two experienced Pennsylvania jurists (Circuit Judges Adams and Weis), as well as an experienced District Judge from New Jersey. Although Petitioner is citizen of New Jersey and the broadcast from Philadelphia reached citizens of both states, Petitioner has consistently urged that his claims are governed by the law of Pennsylvania, with which respondents agree. The Court of Appeals, without resolving the choice of law question, held that "in the absence of any suggestion that there exists here a true conflict of law" there would be "no occasion to diverge from the parties' position" that Pennsylvania law governed (C.A. Opinion A. 27).

The leading Pennsylvania case similar to the instant case is Redding v. Carlton, 233 Pa. Superior Ct. 136, 336 A.2d 351 (1972). The allegedly defamatory charge in Redding was published during a campaign to prevent the purchase of a building site for a township headquarters; the defendants in Redding published that the town supervisor's dual role as public official and land owner was a "conflict of interest at the very least, and perhaps much more," and also contended that his property was "adjacent" to the proposed building site. The truth was that the property was merely "near," not "adjacent" to the proposed site. The Pennsylvania Superior Court held that the charge was incapable of bearing a defamatory meaning, as a matter of Pennsylvania law, and that the factual error was immaterial, since errors of fact about such matters are almost unavoidable. A careful

analysis of the Redding decision appears in the Court of Appeals Opinion at A. 28-31.

It was obvious to the Court of Appeals, and should be obvious to Petitioner, that the Redding decision requires that the matters complained of in the instant case a fortiori are not subject to a defamatory meaning. In Redding the defendants made an explicit charge of "conflict of interest at the very least, and perhaps much more", while in the instant case, no explicit charge of conflict of interest was made and only Petitioner can instinctively feel (without being able to explain) how he has been charged with such conflict. In Redding, the defendants' publication was based upon an error of fact, while in the instant case, Petitioner has now abandoned his only contention based upon an alleged error of fact (the claim

concerning the reference to Petitioner as "brother-in-law" of the convict).

The Court of Appeals accordingly held that all the matters complained of by Petitioner appeared to fall "squarely" and "a fortiori" within the principles of the Redding decision, so that "under Pennsylvania law no defamation has occurred in the present situation" (C.A. Opinion A. 31-32).

B. The Court of Appeals application to Petitioner's claims of New York Times Co. v. Sullivan is manifestly correct.

The Court of Appeals held, in the alternative, that if the references to Petition were defamatory under Pennsylvania law, the New York Times line of cases required summary judgment for respondents. As to Petitioner's contentions that the broadcast did not include exculpatory references to him, the Court of Appeals held that

such references either were unnecessary because the chronology of events was adequately established in the program (C.A. Opinion A.42), or were in fact included in the text (e.g., references to Petitioner as a "former" office holder, C.A. Opinion A.42), and that if there remained "arguably some ambiguity" as to whether Pierce was still on the Port Authority, or had left the Port Authority, at the time of certain speculative real estate purchases, that ambiguity "does not suffice to sustain the burden of establishing with convincing clarity knowing or reckless disregard of falsity" under New York Times (C.A. Opinion A. 42).

The Court of Appeals also held that general references to the Port Authority in the introduction to the broadcasts (quoted in C.A. Opinion at A. 17 n.4), including the phrase "high

speed road to profit," (tied to a portion of the broadcast referring to the Lindenwold High-Speed transit line on which Ralph Cornell's son held sub-contracts), were well within the rule of Greenbelt Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970), even if such references could be held to apply to Petitioner (C.A. Opinion A. 40-41).

The decision of the Court of Appeals, which carefully weighed each of Petitioner's contentions, and which does not depend upon any novel or unusual application of New York Times, is manifestly correct and review of the constitutional issues should also be denied.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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